

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

AUDREY MCNAMARA NEVIS,

No. C 07-02568 MHP

Plaintiff,

**MEMORANDUM & ORDER**

v.

**Re: Defendant John B. Spear's Motion to Dismiss**

WELLS FARGO BANK, et al.,

Defendants.

Plaintiff Audrey McNamara Nevis ("plaintiff") brought this action against defendants Wells Fargo Bank et al., alleging a variety of claims arising out of a home loan and possible foreclosure of her home. Defendant John B. Spear ("Spear"), the licensed broker for defendant Executive Financial Lending Inc., ("Executive") now moves to dismiss plaintiff's second, fourth, fifth, seventh, eighth and ninth causes of action against him for failure to state a claim upon which relief may be granted. Having considered the arguments and submissions for the parties, the court enters the following memorandum and order.

**BACKGROUND**<sup>1</sup>

Plaintiff is an 83-year-old woman living in Marin County, California. Third Amended Complaint ¶ 1 ("Compl."). Plaintiff purchased a home in San Rafael, California in 1988. *Id.* ¶ 35. As of February 2007, plaintiff's home had a value of approximately \$930,000 with a mortgage of approximately \$880,000. *Id.* In the spring of 2006, defendant Shai Moshe ("Moshe") telephoned plaintiff in an effort to sell her a mortgage loan. *Id.* ¶ 36. Moshe informed plaintiff that he would produce a loan at "no cost" with monthly payments significantly lower than what she was paying at

1 the time, along with other representations regarding the loan. Id. Plaintiff ultimately obtained the  
2 loan by following Moshe's instructions. Id. ¶¶ 36-42.

3 Plaintiff brought this action against defendants Wells Fargo Bank, Executive Financial  
4 Lending Inc., John B. Spear, Shai Moshe, Gateway Title Company, Quality Loan Services Corp.,  
5 and Does 1–100, inclusive, in the first instance. See Docket Entry No. 1 (Original Complaint).  
6 Plaintiff has since amended the complaint twice and substituted various Does for named defendants  
7 NC Capital Corp., Carrington Securities L.P., Carrington Mortgage Loan Trust, Series 2006-NC4,  
8 Stanwich Asset Acceptance Company, L.L.C., Michael Moshe Edison, Mark Hanna, Nathan Schine,  
9 Jaklin Khorsandi, International Airlines Travel Agent Network and Tina Aghai. See Compl. ¶¶ 19-  
10 21, 24-27.

11 Plaintiff currently alleges that at the time of soliciting and assisting plaintiff in obtaining her  
12 mortgage loan, “defendants knew or should have known that plaintiff was 81 years old, financially  
13 unsophisticated, unemployed with a total average monthly income of about \$1,050, and that she had  
14 been unable to refinance her home despite having contacted other lenders,” and that therefore she  
15 was not qualified for a mortgage. Id. ¶ 43. Plaintiff further alleges that “defendants” knew or  
16 should have known that plaintiff would be unable to make the monthly payments, the loan would fall  
17 into default, and the property would be sold in foreclosure. Id. ¶¶ 44-46. Plaintiff asserts that her  
18 home is now subject to a higher mortgage than the mortgage plaintiff had prior to obtaining the loan,  
19 that the loan is in arrears by at least \$20,000, that plaintiff has suffered additional costs and  
20 expenses, and that plaintiff faces the imminent threat of foreclosure. Id. ¶ 54.

21 Plaintiff alleges that Spear was the only person affiliated with Executive who has a real  
22 estate broker's license, was Executive's “designated officer/broker” and in that capacity, was  
23 required to supervise and control the mortgage lending activities of Executive and its employees. Id.  
24 ¶ 51. Plaintiff alleges Spear failed to exercise his supervisory responsibilities. Id. ¶ 52. Plaintiff  
25 further alleges that each defendant was the agent and/or employee and/or principal of each of the  
26 remaining defendants, and in doing the alleged acts, each defendant was acting within the course and  
27 scope of the agency and employment and/or with the knowledge, consent, or authority of each of the  
28 remaining defendants and/or with knowledge of their acts and/or wrongdoing. Id. ¶ 29.

Furthermore, plaintiff alleges that each defendant had knowledge and/or constructive notice of, and/or authorized and consented to the acts of each of the other defendants, and/or ratified the wrongful acts of each of the other defendants by, among other things, sharing in the benefits of the act. Id. Plaintiff also alleges that defendants entered into conspiracies with the other defendants to do some or all of the alleged acts, and aided and abetted one another in committing the alleged acts. Id. ¶¶ 30, 32.

### LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal sufficiency of a claim.” Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule 12(b)(6) focuses on the “sufficiency” of a claim rather than the claim’s substantive merits, “a court may [typically] look only at the face of the complaint to decide a motion to dismiss.” Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). A motion to dismiss should be granted if plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, ----, 127 S. Ct. 1955, 1974 (2007). When a plaintiff has not “nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” Id. at 1960. Less than two weeks ago, May 18, 2009, the Supreme Court emphasized its holding in Twombly making clear what is necessary to meet the requirements of Federal Rule of Civil Procedure 8(a)(2). In Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, No. 07-1015, 2009 WL 1361536, at \*12 (May 18, 2009), the Court held that

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” (citations to 127 S.Ct 1955 omitted)

Dismissal also can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light

1 most favorable to the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th  
2 Cir. 1996). The court need not, however, accept as true allegations that are conclusory, legal  
3 conclusions, unwarranted deductions of fact or unreasonable inferences. See Sprewell v. Golden  
4 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Clegg v. Cult Awareness Network, 18 F.3d 752,  
5 754-55 (9th Cir. 1994).

## 6 7 DISCUSSION

8 Plaintiff brings seven out of the nine total causes of action against Spear. The first and sixth  
9 causes of action are brought against other defendants. The second cause of action alleges violations  
10 of the Real Estate Settlement and Procedures Act ("RESPA"), 12 U.S.C. section 2602. The third  
11 cause of action alleges fraud and deceit. The fourth cause of action alleges elder abuse pursuant to  
12 California Welfare & Institution Code section 15600. The fifth cause of action alleges breach of  
13 fiduciary duty. The seventh cause of action alleges rescission and restitution. The eighth cause of  
14 action alleges unfair business practices pursuant to California Business & Professions Code section  
15 17200. The ninth cause of action alleges negligence. Although it is not entirely clear from Spear's  
16 moving papers, which argues for dismissal of the complaint in sum, the particulars of Spear's  
17 arguments challenge all but the third cause of action in this motion.

18 Spear sets forth two arguments as to why plaintiff has failed to allege any legally sufficient  
19 claims. First, Spear argues that there is no private right of action against a designated officer/broker  
20 based solely on failure to supervise. Second, Spear argues that plaintiff has set forth no facts  
21 alleging that Spear was directly involved in the transaction. Mot. at 3:8-14. The court will address  
22 each argument in turn.

23 Plaintiff's complaint sets forth facts alleging how Spear, in his capacity as the designated  
24 officer/ broker, by not ensuring compliance with all federal and state laws, failed to adequately  
25 supervise the salespeople in this transaction. The duty to supervise argued by plaintiff is premised  
26 on California's statutory scheme regulating real estate licensing. Section 10177 (h) of the Business  
27 and Professions Code provides for the suspension or revocation of a broker's license for "failure to  
28 exercise reasonable supervision over the activities of his or her salespersons, or, as the officer

1 designated by a corporate broker licensee, failed to exercise reasonable supervision and control of  
2 the activities of the corporation for which a real estate license is required.” If the broker licensee is a  
3 corporation an officer must be designated by the corporation to be responsible for the supervision  
4 and control of salespersons licensed to the corporation. See Cal.Bus. & Prof.Code §§ 10211 and  
5 10159.2.

6 Spear is correct that this statutory scheme gives no private right of action against a  
7 designated officer/broker based solely on failure to supervise. However, the cases upon which he  
8 relies, In Re Grabau, 151 B.R. 227 (N.D. Cal. 1993) (Smith, J.) and Walters v. Marler, 83 Cal. App.  
9 3d 1 (1st Dist. 1978), *overruled on another ground in* Gray v. Don Miller & Associates, Inc., 35  
10 Cal.3d 498, 505-507 (1984), are distinguishable. Grabau was determined in the context of the  
11 bankruptcy law governing discharge from debts arising from fraud while acting in a fiduciary  
12 capacity. The debtor in question did not actively participate in wrongdoing, was not negligent in  
13 supervising and based upon all the facts before the court could not be found to be acting in a  
14 fiduciary capacity.

15 Walters, on the other hand, was decided upon a full trial record and held the qualifying  
16 broker was not liable to a third party for failure to exercise reasonable supervision over the  
17 broker/salesman. Whether Walters was the impetus for the adoption of section 10159.2 of the  
18 California Business and Professions Code is not clear. But, in 1979, one year after Walters, the  
19 California legislature enacted section 10159.2 spelling out the supervisory and control  
20 responsibilities of designated officers/brokers under section 10211 of the Business and Professions  
21 Code. While a designated broker’s duty to supervise sales agents is detailed in this statutory  
22 scheme, courts have generally found no liability to third parties for a breach of this duty absent other  
23 factors such as facts giving rise to vicarious liability. See, e.g., Holley v. Crank, 400 F.3d 667, 673  
24 (9th Cir. 2005); Valdez v. Downey Savings and Loan Assoc., 2007 WL 1140635 (N.D.Cal. April  
25 17, 2007) (Fogel,J.).

26 Plaintiff correctly states that designated “officer/brokers have been found vicariously liable  
27 for the acts of those they were required to supervise.” Opp. at 4: 15-16. In those situations,  
28 however, courts have found liability not through the failure to supervise in and of itself, but through

1 common law agency principles. Holley, 400 F.3d at 673-74. The Ninth Circuit's decision in Holley  
2 was rendered after remand from the Supreme Court's holding in Meyer v. Holley, 537 U.S. 280  
3 (2003), where the Court addressed the scope of agency law in determining liability under the Fair  
4 Housing Act ("FHA"), 42 U.S.C. §§ 3604(b), 3605(a). In so doing, the Court explained that  
5 traditional agency principles hold the corporation as the principal or employer subject to vicarious  
6 liability for torts committed by its employees or agents. Id. at 286.

7 The very same provisions of the California Business and Professions Code at issue here were  
8 the bases for the vicarious liability theory at play in the Holley case, albeit in the context of the  
9 FHA. The Court held that the ordinary principal/agency relationship demands not only control (or  
10 the right to direct or control) but also "the manifestation of consent by one person to another that the  
11 other shall act on his behalf . . . and consent by the other so to act." Id. Against this backdrop, the  
12 Court ruled that the mere existence of the "right to control" does not automatically create an agency  
13 relationship between the corporation's designated officer/broker and the unlicensed corporate  
14 employee salesperson. Id. at 291. Additional circumstances would be required to impute the  
15 corporation's liability to the corporation's designated officer/broker, such as when a principal or  
16 employer hires an independent contractor, or when the "piercing of the corporate veil" would be  
17 appropriate. Id. at 290, 292.<sup>2</sup>

18 Plaintiff in this case has merely alleged in paragraphs 17, 51 and 52 defendant Spear's duties  
19 of supervision as contemplated by the Business and Professions Code. She has failed to allege any  
20 facts that would give rise to Spear's vicarious liability or that would suggest an actual agency  
21 relationship between Spear and Moshe. Nor has she alleged facts that would support a claim that  
22 Spear is a "person" who would be liable under RESPA.

23 In each of her claims naming Spear plaintiff lumps all of the defendants together relying  
24 solely on paragraphs 17, 51 and 52 for any individuation of Spear and his liability. These  
25 allegations are insufficient to state claims against Spear.

26 Other claims against Spear are also inadequate. For example, plaintiff fails to allege specific  
27 facts as to how Spear would be liable for elder abuse (claim four)<sup>3</sup>. She has failed to allege a basis  
28 for Spear's fiduciary duty to her and how it was breached by Spear (claim five). She has failed to

1 allege what acts of deceit or intent to deceive give rise to rescissory damages and restitution (claim  
2 seven) or on what basis Spear may be liable under section 17200 (claim eight). Finally, she has  
3 failed to allege the basis for a duty of care and breach of that duty by Spear running to plaintiff as  
4 required for claim nine, a claim for negligence.

5 Although Spear has not moved on claim three for fraud and deceit, in an effort to settle the  
6 pleadings the court notes that this claim fails to allege with specificity the misrepresentations and  
7 concealment for which Spear is responsible sufficient to satisfy Rule 9(b). Ashcroft v. Iqbal makes  
8 clear that the Supreme Court's holdings under Rule 8 (a) apply to claims under Rule 9(b). 2009 WL  
9 136156, at \*16.


10 The court is aware that plaintiff has made specific allegations with respect to Shai Moshe  
11 that may meet the specificity requirements as to him. However, as to defendant Spear, it is clear in  
12 view of Iqbal and Twombly that plaintiff's allegations lack the necessary facts to reach him  
13 individually or in his capacity as principal or on any other basis on which the complaint may be  
14 sustained. The court will give plaintiff this one last opportunity to amend so as to comply with the  
15 foregoing order.

16  
17 CONCLUSION

18 For the reasons stated above, the court GRANTS Spear's motion to dismiss with regard to  
19 the second, fourth, fifth, seventh, eighth and ninth causes of action with leave to amend within thirty  
20 (30) days of and in accordance with this order. Plaintiff shall also amend claim three if she intends  
21 to pursue such claim, to meet the requirements of Rule 9(b). Defendant Spear shall file his answer  
22 within thirty (30) days of the filing of the amended complaint.

23 IT IS SO ORDERED.

24  
25 Dated: May 26, 2009

26   
MARILYN HALL PATEL  
27 United States District Court Judge  
28 Northern District of California

**ENDNOTES**

1. Unless otherwise specified, background facts are taken from plaintiff's third amended complaint, and are assumed to be true for purposes of this motion only.

2. These considerations fell outside of the questions presented on *certiorari*. On remand, the Ninth Circuit found an agency relationship that is factually different from what plaintiff argues here. There, the plaintiffs were attempting to hold liable the designated officer/broker, Meyer, for the discriminatory actions of his mid-level manager, Crank. 400 F.3d at 669. Meyer was pursuing other careers and no longer involved in the day-to-day running of the company. *Id.* at 673. He remained the designated officer/broker solely to maintain compliance with applicable law. *Id.* Because Meyer was no longer around for the day-to-day activity of the company, the court found that Meyer had, in effect, delegated his supervisory responsibility to Crank. *Id.* The Ninth Circuit found that the act of delegating his supervisory responsibility established an agency relationship. *Id.* at 674. Furthermore, the court found that Crank was acting in his delegated supervisory capacity, and therefore within the scope of his agency, when he committed the discriminatory acts. The court held Meyer liable under agency principles on these facts. *Id.*

3. . To state a claim for elder abuse under California law, a plaintiff must allege that the defendant (1) took, secreted, appropriated, or retained real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both; or (2) assisted in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. Cal. Welfare & Inst. Code § 15610.30(a).